No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

CHRISTOPHER W. GRENIER,
PAUL C. BOCK and TODD M. SHEA,

Petitioners,

v.

DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition for certiorari presents three questions:

First, whether under the Whistleblower Protection Act a federal agency can overcome its proven retaliation with a clear and convincing affirmative defense where the final decision-maker had imputed knowledge of the target employees' protected disclosures and acted as a conduit for management officials with retaliatory animus.

Second, whether under the Whistleblower Protection Act a federal agency can overcome its proven retaliation with a clear and convincing affirmative defense where the agency's stated reason for punishing the whistleblower employees is retaliatory on its face and the agency's proffered legitimate reasons are inextricably intertwined with that facially retaliatory rationale.

Third, whether under the Whistleblower Protection Act a federal agency can overcome its proven retaliation with a clear and convincing affirmative defense where the agency puts into the record no evidence of similar treatment of similarly-situated non-whistleblowers.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

i.

The names of all parties appear in the caption of the case.

ii.

Counsel for Petitioners, Christopher Grenier, Todd Shea, and Paul Bock, certifies the following:

1. The full name of every party or amicus represented by me is:

Christopher Grenier, Todd Shea, and Paul Bock.

2. The name of the real party in interest represented by me is: None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Peter H. Noone, Esq., AVERY DOOLEY POST & AVERY, LLP, 90 Concord Avenue, Belmont, MA 02478.

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Federal Circuit is unreported and reproduced in the appendix hereto ("App.") at A1. The petitioner has not filed a petition for rehearing.

The April 19, 2005 Final Order of the Merit System Protection Board denying petitioners petition for review and reconsideration is unreported and is reproduced at App. A3.

The September 19, 2003 Initial Decision issued by Administrative Judge William Carroll of the Merit Systems Protection Board, Boston Field Office, is not reported and is reproduced at App. A8.

The April 14, 2003 Order issued by Administrative Judge William Carroll of the Merit System Protection Board, Boston Field Office, is not reported and is reproduced at App. A71.

The December 31, 2002 Order Granting Stay Request issued by Administrative Judge William Carroll of the Merit System Protection Board, Boston Field Office is not reported and is reproduced at A78.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

Petitioners timely filed their Petition for Certiori within ninety (90) days of the entry of judgment by the United States Court of Appeals for

the Federal Circuit, issued July 14, 2006, thereby initiating the instant appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 2302

5 U.S.C. § 1221

STATEMENT OF THE CASE

This case arises out of the Drug Enforcement Administration's treatment of four special agents assigned to the New Bedford, Massachusetts Resident Office ("NBRO"): Todd Shea, Paul Bock, Christopher Grenier, and Daniel Forde, all of whom worked as part of the New Bedford Task Force ("NBTF"), a law enforcement partnership between the DEA, the Massachusetts State Police, and local police departments. During the course of their employment, Petitioners Shea, Bock, and Grenier made protected disclosures concerning office supervisor Resident Agent in Charge ("RAC") John Schaefer's abuse of authority, mismanagement of the office, and ongoing threatening and retaliatory behavior toward individual officers within the task force. Coinciding with Petitioners' own disclosures, three members from the Massachusetts State Police ("MSP") also lodged complaints regarding Schaefer.

The fourth DEA Agent, Forde, made no such protected disclosures.

Petitioners' third level supervisor was SAC Mark Trouville ("Trouville"), who began his tenure with the New England Field Division ("NEFD") in March 2002. Almost immediately, Trouville ordered A/SAC Rodney Benson ("Benson") to conduct a management review of the NBRO, during which Petitioners made protected disclosures regarding Schaefer that detailed the same concerns they had disclosed more than a year earlier. Benson's Management Review Report memorialized Appellant's disclosures and concluded that "[s]ystematic, across the board transfers/removals of all assigned personnel (NBRO) appears to be the only viable solution to what appears to be a long term, ongoing, institutionalized issue fueled by preconceived notions and prejudices toward the RAC." App. at 123.

In August 2002, Trouville forwarded Benson's Management Review Report to HQ Inspectors and included his own cover letter characterizing Petitioners' criticisms of Schaefer as "rebellion" within the office.[1] App. at 129. Aware of Trouville's intent to move agents, and pre-armed with evidence exclusively targeting Petitioners, the Office of the Chief Inspector conducted its inspection of the NEFD and the NBRO on August 19, 2002, led by Senior Inspector Dearing ("Dearing"). After the inspection, Cazenavette, the official who signed the recommendation for reassignments to Chief of Operations Rogelio Guevara ("Guevara"), told

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[1] Chief of Operations Rogelio Guevara, the ultimate deciding official for geographical reassignments, was copied on this cover letter, which indicated that Petitioners and MSP officers reacted to RAC Schaefer with "rebellion."

Trouville that Petitioners had "sided with the MSP" in the "beef" with Schaefer. App. at 131-34.

Prior to making his decision, Guevara received a draft recommendation for reassigning Petitioners, prepared by several Agency officials. Dearing, whom the AJ found to have actual knowledge of Petitioners' whistleblowing activities, helped draft the recommendation. The recommendation for reassignments stated that "SAs Grenier, Shea and Bock failed to support DEA and its mission, and in fact actively supported the position of the Massachusetts State Police against DEA's interest." App. at 126-27. The recommendation, therefore, merely repeated Trouville's, Benson's, and Dearing's insistence that Petitioners had "sided with the MSP."

By signing off on the reassignments, Guevara simply carried out the retaliation recommended by Agency officials with actual knowledge of Petitioners' whistleblowing activities.

On September 26, 2002, Shea was reassigned to El Paso, Texas; Grenier was reassigned to Calexico, California; and Bock was reassigned to Eagle Pass, Texas. The Agency's stated reasoning for reassigning Petitioners was their "siding with MSP" in making protected criticisms of Schaefer and various performance failures. This reasoning is contained in both the September 26, 2002 recommendation and the October 29, 2002 summary to the Agency Administrator. See App. at 126-27 and 93.

Agent Forde, who made no protected disclosures, was not reassigned.

After Petitioners vetted their complaints through the Office of Special Counsel, they presented whistleblower retaliation appeals to the MSPB and requested stays of their reassignments. The AJ granted the stays, commenting in part, "The agency has to realize how bad the appearance is of reassigning only the three whistleblowers [Petitioners] while leaving the non-whistleblower [Agent Forde] in place." App. at 85.

The AJ bifurcated the case into two hearings.

At the first hearing, the AJ concluded Petitioners were whistleblowers and that their whistleblowing was a contributing factor in their reassignments. Making this determination, the AJ specifically found that the Agency officials involved in the decision possessed actual and constructive knowledge of Petitioners' protected disclosures and that the temporal connection between the disclosures and the reassignments demonstrated a retaliatory intent. App. at 72-3. The Agency never challenged these findings.

After the second hearing, however, the AJ found that the Agency would have taken the action absent Petitioners' whistleblowing. App. at 24-64. In deciding that the Agency met its burden of

showing clear and convincing evidence, however, the AJ[2] made at least three material errors of law.

First, the AJ failed to consider that the retaliatory motives of Agency officials with actual knowledge of Petitioners' whistleblowing could, and did, prejudice the deciding official who signed off on the reassignment recommendation. The AJ erroneously determined that, regardless of the tainted influence of management officials with proven retaliatory animus, the Agency must prevail unless the deciding official himself had actual knowledge of Petitioners' whistleblowing. App. at 29-32.

Second, the Agency's stated reason for reassigning Petitioners was retaliatory on its face and inextricably intertwined with the other, post hoc justifications the Agency proffered. The AJ allowed the Agency to prove its affirmative defense without producing any reason for the reassignments not linked to Petitioners' protected disclosures. App. at 34-35.

Third, the AJ allowed the Agency to prove its affirmative defense despite the Agency's failure to put on any evidence that it reassigned the fourth agent in the office, the non-whistleblower, or any other similarly situated employee who was not a whistleblower. App. at 61-64.

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[2] This petition will refer to the AJ's decision because, although the U.S. Court of Appeals for the Federal Circuit affirmed that decision, it did so without issuing an opinion of its own.

The full Merit Systems Protection Board denied a petition for review of the AJ's decision on April 19, 2005. App. at 3.

The United States Court of Appeals for the Federal Circuit affirmed the Board's decision, without opinion, on July 14, 2006. App. at 1.

REASONS FOR GRANTING THE PETITION

The Supreme Court of the United States should grant this petition for a writ of certiori in order to rectify a conflict in federal anti-retaliation case law that endangers federal employee whistleblowers. The conflict concerns the role of imputed knowledge in proving retaliation based on protected activity. Where the protected activity is filing a complaint of discrimination under Title VII, a retaliation claim may succeed despite the decision-maker's lack of actual knowledge. See Shager v. Upjohn Co., 913 F.2d 398 (1990) (imputing improper motives to an impartial decision-making committee that was "just a liability shield invented by lawyers" whose members "acted as the conduit" for a management official's prejudice); see also Echard v. Attorney General, E.E.O.C. 07A20137 (2003) (finding that a "SAC did not need to have actual knowledge of complainant's prior EEO activity when he was acting as a conduit of ASAC's prejudice"). But based on the reasoning in the instant case, a retaliation claim cannot succeed under the WPA unless the decision-maker had actual knowledge.

In the U.S. Court of Appeals decision presently under appeal, a federal agency escapes liability for its proven retaliation simply because the deciding official had no actual knowledge of Petitioners' whistleblowing activity. If a federal agency can produce a clear and convincing affirmative defense by doing nothing more than pointing to the deciding official's lack of actual knowledge, then no federal whistleblower will ever prove retaliation. The rationale in this decision eviscerates the protections afforded under 5 U.S.C. § 2302 for any case based on imputed knowledge. Henceforth, federal agencies will always be able to insulate acts of retaliation by carrying them out through deciding officials with no actual knowledge of the victim's whistleblowing.

ARGUMENT

For the following three reasons, the decision from which Petitioners appeal is erroneous and endangers federal whistleblowers everywhere.

I. Petitioners proved retaliation and the Agency cannot produce a clear and convincing affirmative defense where the deciding official had imputed knowledge of Petitioners' protected disclosures and acted as a conduit for management officials with actual retaliatory animus.

In affirming the final decision of the Administrative Judge ("AJ"), the U.S. Court of Appeals erred because that decision allowed the Agency to prove its affirmative defense simply by

pointing to the deciding official's lack of actual knowledge of Petitioners' whistleblowing. The AJ rendered meaningless the fact that deciding official, who signed off on the recommended reassignments, acted as a conduit for management officials with actual retaliatory animus. The AJ determined that the individuals who recommended Petitioners' reassignments had actual knowledge of Petitioners' whistleblowing. App. at 72-3. Indeed, the recommendation explicitly cited Petitioners' whistleblowing as the reason for the reassignments. App. at 30-1. Petitioners had made protected disclosures substantially similar to protected disclosures made by members of the Massachusetts State Police ("MSP), and the recommendation stated that Petitioners should be reassigned for "siding with the MSP."

Although the AJ found that the deciding official did not know the meaning of "siding with MSP," the AJ failed properly to consider whether the deciding official was unduly influenced by those who did. Instead, the AJ found that the Agency's post hoc reasons for reassigning Petitioners were strong because nothing in the document recommending Petitioners' reassignments would give the deciding official actual knowledge that Petitioners were whistleblowers. App. at 31-2. This decision to focus on the deciding official's actual knowledge is wrong for several reasons.

First, the deciding official's level of knowledge regarding Petitioners' whistleblowing activities is not relevant, much less conclusive, when analyzing the strength of the Agency's reasons for reassigning

Petitioners. The AJ was required to carry out an analysis of the strength of the Agency's reasons independent of any inquiry into what the deciding official actually knew.

Second, the AJ ignored the undue influence of management officials with actual knowledge of Petitioners' whistleblowing. The Initial Decision makes it clear that the deciding official would not have approved the reassignments without the recommendation of the recommending official. Further, the AJ found that the recommending official relied completely on Senior Inspector Dearing, who had actual knowledge of Petitioners' whistleblowing when he drafted the recommendation for Petitioners' reassignments. App. at 36-38 and 40. Despite recognizing that the decision to reassign Petitioners would not have been made without the influence of officials with retaliatory animus, the AJ failed to impute their unlawful motives to the deciding official. Instead, he allowed the Agency to escape liability by choosing a pawn who fulfilled other officials' retaliatory goals.

The AJ's exclusive focus on the deciding official's actual knowledge of Petitioners' whistleblowing activities erroneously resurrected an issue that the first hearing resolved and improperly placed the burden of proof upon Petitioners. The law does not require Petitioners to prove that the Agency knew that their disclosures were legally protected during a consideration of the Agency's affirmative defense. By its plain language, 5 U.S.C. § 2302(b)(8) shows that the proper object of inquiry is whether the employee, and not the agency, had a reasonable

basis to believe that the information he or she disclosed falls within the types of wrongdoing listed in the statute.

Third, it is an error of law to require Petitioners to show that each official involved in the reassignment decision had actual knowledge of their protected disclosures. Under the theory of imputed knowledge, Petitioners can satisfy their burden by showing that some Agency official(s) with actual knowledge unduly influenced the decision-making process. As stated above, Petitioners proved during the first hearing that they would not have been reassigned but for the recommendation of Agency officials with actual knowledge of their whistleblowing. App. at 34-35 and 50.

Consideration of the Agency's affirmative defense cannot erase the AJ's finding that Petitioners made protected disclosures that were a contributing factor in their reassignments. Petitioners satisfied their burden of proof by demonstrating that those with actual knowledge of their whistleblowing influenced the deciding official.

The AJ erased this finding, however, and improperly shifted the burden of proof away from the Agency by holding that the only avenue for contesting the strength of the Agency's reasons was to demonstrate that the deciding official's evaluation of Petitioners was unduly influenced by reprisal for whistleblowing. App. at 35. Under the AJ's analysis, merely insulating the deciding official from any information surrounding Petitioners' protected disclosures would guarantee the Agency's success.

The AJ's approach would enable the Agency to avoid liability for retaliation, no matter how blatant, simply by blindfolding the ultimate decision maker.

II. The Agency cannot produce a clear and convincing affirmative defense where its stated reason for punishing Petitioners is retaliatory on its face and the Agency's proffered legitimate reasons are inextricably intertwined with that facially retaliatory rationale.

The Agency's repeated admission that it reassigned Petitioners because they "sided with the MSP" in making protected disclosures about RAC Schaefer is a patently retaliatory rationale that is inextricably intertwined in the ultimate decision. Management officials with actual knowledge of Petitioners' whistleblowing asserted that Petitioners "sided with the MSP," thereby expressing a retaliatory animus for which the deciding official acted as a conduit.

The accusation that Petitioners "sided with the MSP" originated in Benson's Management Review Report, which memorialized Petitioners' protected disclosures about RAC Schaefer's mismanagement, abuse of authority, and threatening and retaliatory behavior. App. at 107-117. The Management Review Report also memorialized similar disclosures from the MSP. The following passage from the Management Review Report leaves no doubt that Petitioners "sided with the MSP" through their whistleblowing activity.

"At the epicenter of each and every negative issue, according to these interviews, is the RAC. All of the related problems seem to radiate from a sense of division within the office. The underlying reason for this division is clearly two schools of thought separating the offices into two camps: those who have taken the side of the RAC and those who continue to disagree with him. Those who oppose the RAC may have taken these disagreements to extreme, even hurtful measures. Most troubling of all is that this camp is made up of a representative sampling of both offices, to include DEA employees. These DEA employees include CCTF Office Assistant Diane Thompson **and NBRO Special Agents Shea and Bock** [emphasis added]. Based on the removal of the CCTF Officers and Lts., it appeared to ASAC Benson and GS Ducey that these employees developed a "personal" hatred toward RAC Schaefer and made efforts to try to remove RAC Schaefer from his position." App. at 122.

The Management Review Report, which specifically included Shea and Bock among "those who oppose the RAC," contained no evidence that Petitioners "sided with the MSP" in any way other than by echoing MSP whistleblowers concerned about Schaefer's mismanagement and abuse of authority. Without exception, the references to "siding with the MSP" appear in the context of Petitioners' protected disclosures.

The HQ Inspection, which the Agency later cited in an effort to retroactively legitimize the retaliatory reassignments, only confirmed Petitioners' whistleblowing activity. Dearing, who

was the lead inspector for the HQ Inspection, exactly echoed the Management Review Report by accusing Petitioners of having "sided with the Massachusetts State Police[,] much to the chagrin...of RAC Schaefer, so much to the point that RAC Schaefer, in fact, submitted his papers and retired." Only Petitioners' protected disclosures and efforts to remove Schaefer could cause him such chagrin. Dearing received notice that Petitioners "sided with the MSP" from the Management Review Report.

SAC Trouville, who was Petitioners' third-level supervisor, revealed that "siding the MSP" was simply the Agency's euphemism for Petitioners' protected disclosures when he forwarded to the HQ Inspectors a copy of the Management Review Report (App. at 128), from which they learned that Petitioners' "preconceived notions and prejudices towards the RAC" justified "systematic, across the board transfers." App. at 123. Trouville's cover letter to the Management Review Report candidly acknowledges that Schaefer's "heavy handed attempts appear to have been met with rebellion not only from the MSP officers, but also from several of our Special Agents." App. at 139 (emphasis added). The only "rebellion" that Schaefer's heavy-handedness inspired in both Petitioners and MSP officers was their mutual whistleblowing activity.

Similarly, Cazenavette's recommendation for reassignments, which stated that Petitioners "actively supported the position of the Massachusetts State Police," was prepared by three Agency officials with actual knowledge of Petitioners' whistleblowing. App. at 93. Cazenavette

demonstrated his knowledge of Petitioners' protected disclosures, and his retaliatory mindset, when he told Trouville in person that Petitioners had sided with the MSP in the "beef" with the RAC. Trouville, the recommending official, acknowledged that "siding with the MSP" was "precisely" what the Management Review Report indicated. App. at 131.

By declaring, in person and in writing, that Petitioners actively supported the position of the MSP, therefore, Cazenavette could only mean that, like the MSP Lieutenants, Petitioners blew the whistle on Schaefer's mismanagement and abuse of authority. Despite its post hoc efforts to justify the reassignments, the Agency has never backed off from its original, retaliatory rationale. Indeed, the Agency has repeatedly stated that the reassignments were made in "concurrence" with the Management Review Report that documented Petitioners' (and the MSP's) protected disclosures about Schaefer.

The plain meaning of the Agency's chosen language demonstrates that it retaliated against Petitioners for making legally-protected disclosures about RAC Schaefer. The sole issue upon which Petitioners and MSP agreed was that Schaefer mismanaged, abused his authority, and endangered lives. By justifying Petitioners' reassignments with a reason that is retaliatory on its face, the Agency could not possibly prove its affirmative defense by clear and convincing evidence because the retaliatory rationale is inextricably intertwined with all of the Agency's post hoc explanations for the reassignments.

III. The Agency cannot produce a clear and convincing affirmative defense where it puts into the record no evidence of similar treatment of similarly situated non-whistleblowers.

A federal agency cannot meet its clear and convincing burden where it fails to produce any evidence that it treated similarly situated non-whistleblowers in the same manner it treated Petitioners. Similarly situated employees must perform the same job duties and report to the same supervisor. The Agency produced no evidence of similar treatment to non-whistleblowers who perform the same job duties and report to the same supervisor as Petitioners.

In a clearly erroneous exercise, the AJ compared Petitioners, who held non-supervisory positions in New Bedford, Massachusetts, to "a RAC and three assistant special agents in charge from the Detroit field office." App. at 63.

As a matter of law, the Agency could not possibly have proven its affirmative defense by comparing its treatment of the management officials from far-away offices. Moreover, the Agency put on no evidence that these management officials were not whistleblowers themselves. See App. at 63.

Ironically, Agent Forde, a fellow Special Agent who worked in the same office as Petitioners and also reported to RAC Schaefer, is the only employee whom the AJ insists was not similarly situated to Petitioners. App. at 61-2. By contrast, in the early stages of litigation, the AJ recognized that

Petitioners differed from Forde only by virtue of their whistleblowing. At that time, the AJ warned that the Agency "has to realize how bad the appearance is of reassigning only the three whistleblowers while leaving the non-whistleblower [Mr. Forde] in place." App. at 85. The point remains, however, that the Agency and the AJ did not cite to one instance when the Agency reassigned a similarly situated non-whistleblower.

Faced with uncontradicted evidence that Petitioners' reassignments were without precedent, no reasonable trier of fact could have found that the Agency proved its affirmative defense by clear and convincing evidence. Far from offering clear and convincing proof, the Agency put on no evidence that could explain away the "bad...appearance...of reassigning only the three whistleblowers while leaving the non-whistleblower [Mr. Forde] in place." An agency cannot prevail when it defaults on one of the required factors of its affirmative defense.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

/s/

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